FOURTH DIVISION
March 31, 2016

No. 1-14-0255

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Cook County.
	)	
v.	)	No. 13 CR 11685
	)	
BARRETT ADAMS,	)	Honorable
	)	Vincent M. Gaughan,
Defendant-Appellant.	)	Judge Presiding.

PRESIDING JUSTICE McBRIDE delivered the judgment of the court.
Justices Ellis and Cobbs concurred in the judgment.

O R D E R

¶ 1 *Held*: The trial court's denial of defendant's motion to quash arrest and suppress evidence is affirmed where, upon seeing nearby police officers, defendant concealed an object in his sleeve consistent in size and shape with packaged narcotics, thus providing probable cause for a search. In addition, two methamphetamine-based charges erroneously imposed against defendant are vacated, and the fines and fees order is corrected to reflect credit for the days defendant spent in custody prior to sentencing.

¶ 2 Following a bench trial, defendant Barrett Adams was convicted of possession of between 1 and 15 grams of a controlled substance (cocaine). Defendant was sentenced to 34 months in prison and assessed various fines and fees. On appeal, defendant contends the trial court erred in denying his motion to quash his arrest and suppress evidence based on a finding that a police officer had probable cause to search defendant after seeing him place an object up his shirt sleeve. In addition, defendant challenges two methamphetamine-related charges imposed against him and contends the fines and fees order must be amended to reflect a $5-per-day credit for his time in custody prior to sentencing. For the reasons set forth below, defendant's convictions and sentence are affirmed. However, we vacate the two methamphetamine-based assessments and order that the fines and fees order be corrected.

¶ 3 Defendant was charged with the possession of between 1 and 15 grams of a controlled substance (cocaine) with intent to deliver (720 ILCS 570/401(c)(2) (West 2012)) and with the possession of that substance on school property (720 ILCS 570/407(b)(1) (West 2012)). Defendant filed a motion to quash his arrest and suppress evidence. The trial court conducted a hearing on defendant's motion concurrent with defendant's bench trial.

¶ 4 At the hearing, Chicago police officer Matthew Bouch testified he had been a police officer for 11 years and had made "thousands" of previous drug arrests. He testified that at about 3 p.m. on May 18, 2013, he was in plain clothes and riding in an unmarked car with two other officers. He was seated in the rear seat of the car behind the driver.

¶ 5 Officer Bouch testified he observed defendant standing on the steps of a school in the 100 block of South Kostner. He said he was about 75 feet away from defendant when he saw defendant "look in my direction and then take a golf ball[-]sized object and place it into his left

sleeve." He testified he was familiar with narcotics packaging and that heroin and crack cocaine are often packaged in quantities the size of a golf ball.

¶ 6 Officer Bouch testified he got out of the vehicle and approached defendant, who was then seated on the school steps. After telling defendant to stand up, the officer "grabbed [defendant's] left hand, left arm as he was standing up. Officer Bouch then began what he described as a "protective pat down." He stated he "could also see and knew immediately that it was narcotics in his sleeve and I recovered it." The officer testified the items were recovered from defendant's sleeve simultaneous to the pat-down search.

¶ 7 Officer Bouch testified he saw in defendant's sleeve "[a] portion of the golf ball[-]sized object which was a plastic bag which contains zip-lock bags inside of it." He said the bags contained suspect crack cocaine. When asked if the item was inside defendant's sleeve, the officer replied: "It was in his sleeve but it was so large that you can see a portion of it sticking out." The officer testified the plastic bag he recovered from defendant's sleeve contained eight smaller knotted plastic bags containing a total of 101 bags of suspect crack cocaine. Defendant was placed under arrest.

¶ 8 On cross-examination, Officer Bouch said he did not see defendant exchange items or money with any person nearby. He described the golf ball-sized object as being about two inches in diameter and said he observed the object for a "few seconds" before defendant put it in his sleeve. He said he could see the bag was plastic but could not "see what was inside of it." He said he could see "a portion of the bag" in defendant's sleeve as he began the protective pat-down. The portion of the bag he saw protruding from defendant's sleeve was about the size of a nickel and contained a zip-lock bag inside the outer bag.

¶ 9 Chicago police officer Thomas Hanrahan testified he had been a Chicago police officer for about 12 years and had made "hundreds" of previous drug arrests. Officer Hanrahan drove the unmarked car in which Officer Bouch and a third officer were riding. He first observed defendant standing on the school steps about 75 feet away.

¶ 10 Officer Hanrahan testified defendant placed a clear plastic bag containing small objects into his left sleeve. Based upon his experience with narcotics arrests and with similar plastic bags, he testified that believed the bag contained narcotics. He stated on cross-examination that the size of the bag was "a little bit bigger than a golf ball."

¶ 11 Officer Hanrahan got out of the car after defendant had been detained. At that point, he could see that Officer Bouch had recovered a plastic bag containing eight smaller knotted bags. The parties stipulated 67 of the 101 items recovered from the plastic bag were tested and those items tested positive for 8 grams of cocaine.

¶ 12 Defense counsel argued Officer Bouch lacked probable cause to perform a protective pat-down search of defendant after seeing defendant put an unknown item up his sleeve. Counsel contended that when Officer Bouch approached defendant, he could not have seen a part of the plastic bag protruding from defendant's sleeve.

¶ 13 At the close of evidence, the trial court held as follows:

> "On the motion to quash the arrest and suppress the evidence, the officer's observations were in a place where they were entitled to be. They were in their car. Once they got out of the car, as Officer Bouch testified, [defendant] looked in his direction and placed a golf ball-sized object up his sleeve. Then the officer proceeded and he saw a smaller bag, and he recognized this as narcotics. I find there was probable cause. Motion to quash arrest and suppress evidence is denied."

The court found no evidence that a drug transaction had taken place and found defendant guilty of possession of a controlled substance, which was a lesser-included offense of the charged crime of possession with intent to deliver. The court also ordered the count of possession of the controlled substance on school property would merge into that finding. Defendant was sentenced to 34 months in prison. He now appeals.

¶ 14 As a threshold issue, the State points out defendant failed to challenge the validity of the search in his motion for a new trial. A defendant generally must preserve an issue for review by objecting a trial and including the issue in a post-trial motion, and the failure to do so results in the forfeiture of that issue on appeal. *People v. Ward*, 154 Ill. 2d 272, 293 (1992); *People v. Enoch*, 122 Ill. 2d 176, 186 (1988). However, as the State acknowledges, the validity of the search in this case is properly before this court because whether a search occurred is a constitutional issue that was raised in this case in defendant's motion to suppress, and our supreme court has held such an issue that is viable for later inclusion in a post-conviction petition is not subject to forfeiture on direct appeal. See *People v. Cregan*, 2014 IL 113600, ¶¶ 16-18 (judicial economy favors addressing the issue in a direct appeal); *People v. Almond*, 2015 IL 113817, ¶ 54. In light of that precedent, we will review the merits of defendant's claim.

¶ 15 The fourth amendment to the United States Constitution protects individuals from unreasonable searches and seizures. U.S. Const., amend. IV. In reviewing a trial court's ruling on a motion to suppress evidence, this court will uphold factual findings unless they are against the manifest weight of the evidence. *People v. Jones,* 215 Ill. 2d 261, 268 (2005). However, this court reviews *de novo* the ultimate legal question of whether the suppression of evidence is warranted. *People v. Luedemann*, 222 Ill. 2d 530, 542 (2006); *Ornelas v. United States*, 517 U.S. 690, 699 (1996).

¶ 16 Generally, a search and seizure is reasonable only if the government has first obtained a warrant authorizing the action after a finding of probable cause. *Illinois v. McArthur*, 531 U.S. 326, 330 (2001). "Probable cause exists when the totality of the facts and circumstances known to the officers is such that a reasonably prudent person would believe that the suspect is committing or has committed a crime." *People v. Garvin*, 219 Ill. 2d 104, 126 (2006).

¶ 17 The plain-view doctrine authorizes the seizure of illegal or evidentiary items that are visible to a police officer whose access to the object has some prior justification under the Fourth Amendment and who has probable cause to suspect the item is connected with criminal activity. *Illinois v. Andreas*, 463 U.S. 765, 771 (1983). Whether property in plain view of police may be seized turns on "the legality of the intrusion that enables them to perceive and physically seize the property in question." *Texas v. Brown*, 460 U.S. 730, 737 (1983). An officer may seize property that is in plain view if three requirements are met: (1) the officer must be lawfully located in the place where he observed the object; (2) the object must be in plain view; and (3) the object's incriminating nature must be immediately apparent. *People v. Garcia*, 2012 IL App (1st) 102940, ¶ 4.

¶ 18 The parties in this case focus on the third requirement. Defendant contends that until Officer Bouch approached him, held his arm and saw the item more closely, the officer had only observed him from 75 feet away putting an unknown golf ball-sized object in his sleeve. The State responds Officer Bouch had probable cause to search defendant based on the sight of the object in plain view, along with the officer's familiarity with narcotics packaging and defendant's act of concealing the object upon seeing the police.

¶ 19 The "immediately apparent" element requires sufficient evidence to justify the reasonable belief that the defendant has committed or is committing a crime. *Jones*, 215 Ill. 2d at 273-74;

People v. Humphrey, 361 Ill. App. 3d 947, 951 (2005). If the officer lacks probable cause to believe the object in plain view is contraband without conducting some further search of the object, *i.e.*, if the incriminating nature of the object is not immediately apparent, its seizure is not justified under the plain-view doctrine. *Jones*, 215 Ill. 2d at 272, citing *Minnesota v. Dickerson*, 508 U.S. 366, 374-75 (1993).

¶ 20 The incriminating nature of an object is immediately apparent if the officer has probable cause to believe that the object is evidence of a crime without searching further. *People v. Sinegal*, 409 Ill. App. 3d 1130, 1140 (2011), citing *People v. Jones*, 214 Ill. App. 3d 256, 258 (1991). What constitutes probable cause for searches and seizures is governed by the totality of the facts and circumstances known to the officer at the time, based upon the officer's skill and knowledge, rather than that of an average citizen under the same circumstances. *Sinegal*, 409 Ill. App. 3d at 1140; *People v. Jones*, 214 Ill. App. 3d 256, 258 (1991), citing *People v. Stout*, 106 Ill. 2d 77, 86 (1985).

¶ 21 In determining whether probable cause exists, a reviewing court considers the totality of the circumstances known to the arresting officers when they made the arrest. *People v. Grant*, 2013 IL 112734, ¶ 11. Where officers are working together in investigating a crime, the knowledge of each constitutes the knowledge of all, and probable cause can be established from all the information collectively received by the officers. *People v. Ortiz*, 355 Ill. App. 3d 1056, 1065 (2005). The factual knowledge of the officer or officers, based on law enforcement experience, is relevant. *Grant*, 2013 IL 112734, ¶ 11.

¶ 22 Probable cause to believe that a package contains illegal drugs does not require absolute certainty of its contents on the part of the officer. *Sinegal*, 409 Ill. App. 3d at 1139, citing *Brown*, 460 U.S. at 742. Moreover, probable cause is not dependent upon an officer's prior visual

observation of a substance. *People v. Rucker*, 346 Ill. App. 3d 873, 889 (2003). Here, Officer Bouch testified that as he stood about 75 feet away from defendant, he saw defendant look at the officers in their unmarked car and "then take a golf ball-sized object and place it into his left sleeve." The officer stated that in his experience, heroin and crack cocaine were packaged in quantities the size of a golf ball. Officer Bouch acknowledged on cross-examination that he only observed the object for a "few seconds."

¶ 23 Defendant's act of placing the item in his sleeve upon seeing the officers, when considered in isolation, was not sufficient to establish probable cause. See *People v. Smith*, 2015 IL App (1st) 131307, ¶¶ 29-36 (where sole basis for probable cause claim was defendant's act of reaching toward rear of passenger seat, no reasonable basis existed for search of vehicle). However, a furtive movement can support a warrantless search when it is coupled with another circumstance tending to show probable cause, such as a suspicious object in plain view. *People v. Trisby*, 2013 IL App (1st) 112552, ¶ 16. The "distinctive character" of an item can support an officer's identification of that item as contraband. See, *e.g.*, *People v. Hilt*, 298 Ill. App. 3d 121, 124-25 (1998) (substance in knotted corner of plastic bag supported officer's reasonable suspicion that bag in plain view contained cocaine).

¶ 24 Here, Officer Bouch suspected the item was concealed by defendant was packaged narcotics due to its shape resembling a golf ball. The incriminating nature of the object defendant placed up his sleeve was immediately apparent to Officer Bouch. In addition, Officer Hanrahan testified he saw the bag contained small objects. Based upon the totality of the facts known to police, Officer Bouch had probable cause to seize the item upon approaching defendant. Therefore, the trial court's denial of defendant's motion to quash his arrest and suppress evidence is affirmed.

¶ 25 As an alternative argument on appeal, defendant contends Officer Bouch's search of his sleeve did not qualify as a protective frisk under *Terry v. Ohio*, 392 U.S. 1 (1968), because there was no basis for the officer to believe he was armed and dangerous. Given our conclusion that Officer Bouch had probable cause to seize the item based on his initial observations of defendant and the item, we need not consider whether the search qualified as a protective frisk.

¶ 26 The remaining issues raised on appeal involve the fines and fees imposed in this case, which total $1,254, and the monetary credit toward those charges that defendant can receive for the days spent in custody prior to sentencing.

¶ 27 Initially, the parties argued to this court that defendant could bring these claims under the rule that a sentence that does not conform to statutory requirements is void. The State conceded that these claims were not forfeited, and agreed that this court should direct the clerk of the court to amend the fines and fees order to correct any error. In a supplemental brief, defendant acknowledged that during the pendency of this appeal, the Illinois Supreme Court abolished the void sentencing rule in *People v. Castleberry*, 2015 IL 116916, ¶ 19, but continued to maintain that he was entitled to a reduction in the monetary assessments imposed against him. The State was given the opportunity to respond to defendant's supplemental brief, but did not do so. Since this court may modify a fines and fees order without remanding the case back to the circuit court pursuant to Supreme Court Rule 615(b), we will review defendant's contentions to determine if any error exists. Ill. S. Ct. R. 615(b)(1) (eff. Aug. 27, 1999) ("[o]n appeal the reviewing court may *** modify the judgment or order from which the appeal is taken"); *People v. McCray*, 273 Ill. App. 3d 396, 403 (1995) ("[r]emandment is unnecessary since this court has the authority to directly order the clerk of the circuit court to make the necessary corrections").

¶ 28 Specifically, defendant argues that because he was not convicted of a methamphetamine-related offense, two charges should be vacated: the $100 Methamphetamine Law Enforcement Fund charge (730 ILCS 5/5-9-1.1-5(b) (West 2012)) and the $25 Methamphetamine Drug Traffic Prevention Fund assessment (730 ILCS 5/5-9-1.1-5(c) (West 2012)). Defendant further contends that the trial court failed to order monetary credit against his charges for time spent in custody prior to sentencing. Under section 110-14(a) of the Code of Criminal Procedure, an offender who has been assessed one or more fines is allowed a $5-per-day credit against those fines for time spent in custody as a result of the offense for which the sentence was imposed. 725 ILCS 5/110-14(a) (West 2012). The State concedes both errors, and we accept those concessions.

¶ 29 The sole remaining issue is the number of days that defendant served in custody for which the $5-per-day credit can be awarded. The mittimus indicates that defendant spent 223 days in custody for which credit can be awarded, but the State argues on appeal that the mittimus should be amended to reflect 222 days of credit because defendant cannot receive credit for the date he was sentenced. See *People v. Williams*, 239 Ill. 2d 503, 509-10 (2011) (the date on which a defendant is sentenced is not counted as a day of pre-sentence credit). Even though defendant agrees with that position in his reply brief, the State's request that this court reduce the number of days defendant served in custody prior to sentencing runs afoul of our supreme court's recent decision in *Castleberry*.

¶ 30 In *Castleberry*, our supreme court observed that Supreme Court Rule 604(a) sets forth with specificity those instances where the State may appeal in a criminal case and noted that the rule does not permit the State to appeal a sentencing order. *Castleberry*, 2015 IL 116916, ¶ 21 (citing Ill. S. Ct. R. 604(a) (eff. July 1, 2006)). The supreme court reasoned that because Rule 604(a) does not allow the State to appeal a sentencing order, the State could not bring a "*de facto*

cross-appeal" by raising a claim in its response brief that would lessen the rights of the defendant. *Castleberry*, 2015 IL 116916, ¶¶ 22-23; see also *People v. Maxey*, 2015 IL App (1st) 140036, ¶¶ 47-49 (discussing *Castleberry*). Accordingly, we reject the State's request that the mittimus be corrected.

¶ 31 The mittimus that was entered by the circuit court indicated defendant spent 223 days in custody for which he can receive credit. Therefore, defendant's applicable credit of $5 per day totals $1,115. That credit more than fully offsets the $605 in fines that remain against him after the vacatur of the $125 in methamphetamine-related charges.

¶ 32 In conclusion, defendant's convictions and sentence are affirmed. Defendant's fines and fees order lists a total of $1,254 in charges. We vacate the $125 in methamphetamine-related assessments and after removing the erroneous assessments and applying $605 in credit towards defendant's charges that qualify as fines, we calculate defendant's remaining amount owed is $524. Therefore, we order the fines and fees order be corrected to reflect that amount owed by defendant.

¶ 33 Conviction and sentence affirmed; two methamphetamine-related assessments vacated; fines and fees order corrected.